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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FRED RIVERA NAVARETTE, Defendant and Appellant.	B257567 (Los Angeles County Super. Ct. No. KA101274)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed with directions.

Jonathan E. Demson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Stacy S. Schwartz, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Following a jury trial, defendant Fred Rivera Navarette was found guilty of first-degree murder, possession of a firearm by a felon, possession of a short-barreled shotgun, and vehicle theft, with true findings on related firearm-use and criminal street gang allegations. On appeal, he contends the trial court abused its discretion by denying his motion to bifurcate the gang allegations, and the gang expert's reliance on testimonial hearsay violated the Confrontation Clause. Defendant also contends, and the People concede, the abstract of judgment reflects fines and assessments not imposed at sentencing.

We correct the abstract of judgment for the indeterminate sentence to add an additional fee, and correct the abstract of judgment for the determinate sentence to remove certain fines and assessments. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information and Motion to Bifurcate*

Defendant was charged by information with four crimes. Count one charged defendant with first-degree murder of Thomas Fernandez (Pen. Code,[1] § 187, subd. (a)), and alleged the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)), and that a principal used and intentionally discharged a firearm, causing great bodily injury or death (§ 12022.53, subds. (b)–(d)). The information also charged defendant with possession of a firearm by a felon (§ 29800, subd. (a)(1); count two), possession of a short-barreled shotgun (§ 33215; count three), and vehicle theft (Veh. Code, § 10851, subd. (a); count four). The information alleged all counts were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(A).) The information also alleged one strike prior (§ 667, subds. (b)–(i), § 1170.12, subds. (a)-(d)), one serious-felony prior (§ 667, subd. (a)(1)), and one prison prior (§ 667.5, subd. (b)).

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[1] All undesignated statutory references are to the California Penal Code.

Defendant pled not guilty and denied the allegations. The trial court bifurcated the determination of the prior-conviction allegations from the substantive crimes, but denied the defense motion to bifurcate the gang allegations.

2. *Defendant's Role in Fernandez's Murder*

According to the evidence at trial, on October 27, 2012, Patrick Clark walked to defendant's house to buy methamphetamine. The two were neighbors, and had known each other for about a year. When Clark arrived, defendant was on his way out with some friends; he invited Clark to join them. The friends drove them to a residential neighborhood in Rancho Cucamonga, where defendant stole a 1999 Chevrolet pickup truck. Together, defendant and Clark drove the truck back to defendant's home in Covina.

At around 3:30 a.m., defendant and Clark left defendant's house and drove the stolen truck to North Vecino Drive in Covina. Defendant drove, and Clark sat in the passenger seat; they blasted "I Rep That West," by Ice Cube. As they drove down North Vecino, defendant and Clark passed a group of five people. The group, which was gathered on the sidewalk to the right of the truck, included Thomas "Boxer" Fernandez, a member of the El Monte Flores criminal street gang. Clark did not recognize anyone on the sidewalk. However, a member of the group recognized Clark, who had been in her high school class. When the truck reached the cul-de-sac at the end of the street, defendant turned the truck around, cranked up the music, and headed back. At that point, the driver's side of the truck was closest to the sidewalk, and the window was rolled down.

Defendant drove eight to ten feet past the group and stopped the truck. He then leaned forward and picked up a short-barreled shotgun. Defendant pointed the gun out the window toward the group, yelled "West Covina," and fired. Fernandez was hit, and ultimately died from a shotgun wound to the chest. As defendant drove away, he warned Clark not to tell anyone about the shooting.

From North Vecino Drive, defendant and Clark drove to the Baldwin Park home of defendant's cousin, Albert Vargas. Defendant told Vargas the shotgun was "hot," and

asked Vargas to keep it for him. Defendant and Clark then returned to their neighborhood. Clark went home and went to sleep. The next day, October 28, 2012, defendant asked Clark to move the truck to a nearby park. Later that day, they abandoned it in a parking lot in Pomona.

At some point during the police investigation, Clark led police to the stolen truck, which matched the one seen in a crime-scene surveillance video. Defendant's DNA was found inside the truck. Clark also gave police a description of—and later confirmed a photograph of—Vargas's house, where defendant had left the shotgun. Police recovered the "hot" shotgun and confirmed it was used to kill Fernandez. Defendant's DNA was also found on the gun.

3. *Gang Evidence*

West Covina Police Officer Eric Melnyk testified for the prosecution as an expert on criminal street gangs. According to Melnyk, West Covina 13 was aligned with the Mexican Mafia prison gang. West Covina 13's claimed territory encompassed the entire City of West Covina, and it was attempting to expand into an adjacent city, Covina. At least six other gangs also claimed parts of this territory.

Melnyk explained that at the time of the shooting, West Covina 13 had about 30 members—only 10 to 15 of whom were not incarcerated. The membership was subdivided into three smaller cliques—Los Villains, Krazy Ass Youngsters, and Falster Park. The gang's primary activities included graffiti, vandalism, drug sales, robbery, and assault; members were known to carry weapons—usually firearms. West Covina 13 members announced their affiliation with "WC13" and "WCX3" tattoos and symbols, as well as "W" and "C" hand signs. Like other gangs with the word "west" in their names, West Covina 13 sometimes announced their presence by playing the song "I Rep That West," by Ice Cube.

Based on their prior interactions and defendant's distinctive tattoos, Melnyk opined that defendant belonged to West Covina 13 and was a member of the Krazy Ass

Youngsters clique.[2] He testified that the clique comprised younger gang members who had joined the gang in the 1990s and 2000s. Defendant used the gang moniker "Cholo."

Melnyk also testified about the victim's gang, El Monte Flores. El Monte Flores is located in the City of El Monte. On cross-examination, Melnyk stated that El Monte Flores had many more members than West Covina 13. He also acknowledged that West Covina 13 and El Monte Flores were neither at war nor in conflict at the time of the shooting.

Melnyk opined that Fernandez's murder was committed for the benefit of West Covina 13. He testified that the murder helped expand West Covina 13's influence into geographic areas controlled by other gangs. Melnyk also noted that West Covina 13 in general, and defendant in particular, gained "respect" by showing that defendant was not scared to shoot a member of another gang "on sight." He explained that Fernandez's murder would instill fear in the community and make it less likely that citizens victimized by West Covina 13 would report the gang's future crimes to the police.

4. *The Verdict and Sentence*

After the guilt-phase trial, the jury found defendant guilty of all counts, and found all allegations true. After a bench trial, the court found all prior-conviction allegations true.

The court denied defendant's motion to dismiss his prior strike, and sentenced him to 80 years to life. The court selected count one (§ 187, subd. (a)) as the base term, and sentenced defendant to 50 years to life (25 years to life, doubled for the strike prior). The court added 25 years for the firearm enhancement (§ 12022.53, subd. (d)), and five years for the serious-felony prior (§ 667, subd. (a)(1)), to run consecutive, and stayed the remaining firearm enhancements (§ 12022.53, subds. (b)–(c)) under

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[2] Defendant's ex-girlfriend also testified to his gang membership.

section 654. The court imposed and stayed sentences on the remaining counts and enhancements under section 654. This timely appeal followed.

DISCUSSION

1. *The Trial Court Did Not Abuse its Discretion by Denying Defendant's Motion to Bifurcate the Gang Allegations*

Before trial, defendant's attorney made an oral request to bifurcate trial of the gang allegations from the substantive charges, arguing the gang evidence had little probative value on the question of guilt and was highly prejudicial. The trial court denied the motion, concluding the gang evidence was relevant to motive and identity, and was woven throughout the facts of the case. Defendant contends the court abused its discretion, and its failure to bifurcate requires reversal.

The trial court has discretion to bifurcate the trial of a gang enhancement from the trial of the substantive offenses. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1044, 1048–1051 (*Hernandez*).) Bifurcation is unnecessary when the evidence supporting a gang enhancement would be admissible at trial of the substantive offenses. (*Id.* at pp. 1049–1050.) The party seeking bifurcation must "clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." (*Id.* at p. 1051.) "[E]vidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*Id.* at p. 1049.) We review denial of a motion to bifurcate a gang allegation for abuse of discretion (*id.* at pp. 1050–51), based on the record before the court when it ruled on the bifurcation motion (cf. *People v. Avila* (2006) 38 Cal.4th 491, 575). As we explain below, the court did not abuse its discretion in denying the motion to bifurcate.

First, the gang evidence in this case was relevant in establishing a motive for Fernandez's murder and in helping to identify his killer. At trial, the gang expert

testified that defendant was a member of West Covina 13, and that West Covina 13 was a small gang. Since the trial testimony established that Fernandez's killer yelled "West Covina" during the shooting, the gang evidence supported the inference that the victim's killer was one of the 10 to 15 non-incarcerated members of West Covina 13. The gang evidence was also relevant to motive, because it explained why killing a member of a different gang, outside of West Covina 13's claimed territory, would increase defendant's and West Covina 13's stature. In short, since the evidence supporting the gang enhancements was also relevant to defendant's guilt of the substantive offenses, the court did not err in denying bifurcation. (*Hernandez, supra*, 33 Cal.4th at pp. 1049-1050.)

Second, defendant did not "clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." (*Hernandez, supra,* 33 Cal.4th at p. 1051.) At the hearing on the bifurcation motion, defendant did not point to any specific evidence—such as particular photographs of gang signs and symbols, or testimony establishing the predicate crimes—that the court should exclude or sanitize.[3] Instead, defendant objected generally that gang evidence is inherently prejudicial: "We would indicate that it's extremely prejudicial in terms of contaminating the trier of fact's mind when they receive information that he, in fact, is being charged with this gang allegation, and then receive the evidence on it during the course of the trial." This statement is not sufficient to meet defendant's burden of proof on a bifurcation motion. We also note that the court minimized any prejudice to defendant by giving the jury two limiting instructions, CALJIC Nos. 17.24.3 and 2.80, in connection with Melnyk's gang testimony and expert opinions. CALJIC No. 17.24.3 instructed the jury not to use the gang evidence as propensity or character evidence; CALJIC No. 2.80 informed the jury

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[3] Defendant challenges this evidence thoroughly on appeal, arguing it was cumulative and confusing. Because these arguments were not before the court below, we may not consider them in evaluating the court's ruling. (See *People v. Avila*, *supra*, 38 Cal.4th at p. 575 [ruling reviewed based on information before court at the time of the hearing].)

that although an expert could rely on statements made to third parties, those statements do not prove the truth of what was said.

Third, defendant has not established that the admission of the gang evidence was so highly prejudicial as to violate his due process rights by rendering the trial fundamentally unfair. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824]; *People v. Albarran* (2007) 149 Cal.App.4th 214, 229–231 (*Albarran*) [failure to bifurcate violated due process].) Although the gang evidence may have constituted a significant part of the People's case, it was not the primary evidence of defendant's guilt of the substantive crimes. To the contrary, the surveillance footage, eyewitness testimony, and DNA evidence provided the crucial proof. For example, witness testimony and DNA evidence established defendant stole a Chevrolet pickup truck. Surveillance video and witness testimony placed the truck at the murder scene, and placed defendant in the driver's seat. The shotgun found at defendant's cousin's house matched the shotgun shell found at the crime scene—and defendant's DNA was found on the shotgun. Nor can the evidence of the predicate crimes—which were far less egregious than the substantive charges—be compared to the evidence presented in *Albarran*, which included evidence that the defendant sported a tattoo highlighting his association with the Mexican Mafia, and evidence that graffiti found around his home contained threats to kill police. (*Albarran*, *supra*, 149 Cal.App.4th at p. 220.)

Finally, while the gang evidence was certainly helpful to the prosecution, it also benefited the defense by undermining the prosecution's argument that defendant had a motive to shoot Fernandez. The evidence established West Covina 13 was small and weak. The gang had only 10 to 15 non-incarcerated members, divided into three cliques, fighting at least six other gangs for control of a large area. The victim's gang, El Monte Flores, was substantially larger, was not at war with West Covina 13, and claimed a territory that was relatively far away. Quite simply, this case is not one of those "rare and unusual occasions where the admission of evidence has violated federal due process and rendered the defendant's trial fundamentally unfair." (*Albarran*, *supra*, 149 Cal.App.4th at p. 232.)

2. *Defendant Has Not Established that Melnyk's Testimony Violated the Confrontation Clause*

Defendant contends the prosecution's gang expert, Melnyk, improperly relied on testimonial hearsay in violation of the Confrontation Clause. We disagree.

The Confrontation Clause of the Sixth Amendment guarantees the "right [of a criminal defendant] . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 316 [129 S.Ct. 2527, 2535]; see Cal. Const., art. I, § 15.) Confrontation Clause claims are governed by *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), which held that the Sixth Amendment forbids "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Id.* at pp. 53–54.)

In *Crawford*, the United States Supreme Court held that the Confrontation Clause applies to testimonial hearsay; where non-testimonial hearsay is at issue, state hearsay laws apply. (*Id*. at p. 68.) The question of whether a gang expert's reliance on testimonial hearsay violates a defendant's Confrontation Clause rights is currently pending before the California Supreme Court.[4] However, we need not reach the question of whether a gang expert may rely on testimonial hearsay because we find he did not rely on hearsay in this case.

Defendant argues that when a criminal defendant raises a constitutional challenge to the government's proffered evidence, the government must prove by a preponderance of evidence that the evidence is constitutionally admissible. Be that as it may, the rules of evidence are not self-executing. In order to preserve an evidentiary objection on appeal, a party must make a timely objection in the trial court "so stated as to make clear the specific ground of the objection or motion." (Evid. Code, § 353, subd. (a).) The purpose of this rule is to give the trial court a concrete legal proposition to pass on,

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[4] *People v. Sanchez* [(2014) 324 P.3d 273], review granted May 14, 2014, S216681.

to give the opponent an opportunity to cure the defect, and to prevent abuse. (*People v. Partida* (2005) 37 Cal.4th 428, 434.)

Here, defendant directs us to four pages, out of more than 60 pages of Melnyk's testimony, in support of his argument that the gang expert improperly relied on hearsay evidence. However, he does not quote the testimony on those pages that he finds objectionable. Defendant also does not explain why—or even if—the objectionable statements on those pages were *testimonial* hearsay. As such, defendant has not, in the first instance, established a Confrontation Clause violation. Nevertheless, we have examined the cited pages in the record and find no error.

Hearsay is an out-of-court statement offered for the truth of the matter asserted. (Evid. Code, § 1200, subd. (a).) Our review of the cited pages reveals only one out-of-court statement that could have been offered to prove the truth of the facts expressly stated: Melnyk testified that in the course of assaulting a security guard with a firearm, West Covina 13 member Brian Hernandez "told the security guard he was from West Covina 13." However, Melnyk did not rely on that statement as a basis for his opinion that Hernandez belonged to the gang. Instead, Melnyk based his opinion on Hernandez's tattoos: "West Covina" emblazoned in large letters across his torso, framed by WC on his shoulders and 13 on his arms; his association with other gang members; and his gang graffiti. Because Melnyk did not rely on the out-of-court statement as a basis of his opinion, his testimony did not violate the Confrontation Clause. Put another way, because there was ample non-hearsay evidence that Hernandez belonged to West Covina 13, any error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. 18; *People v. Livingston* (2012) 53 Cal.4th 1145, 1159 [Confrontation Clause errors reviewed under *Chapman*].)

To the extent that defendant is attempting to argue that Melnyk could not have relied on photographs of other West Covina 13 gang members or certified minute orders establishing a pattern of criminal gang activity in forming his opinion, defendant forfeited that argument. The record before us shows the photographs and certified

minute orders were admitted in evidence (see, e.g., Exhibits 72, 73, and 74), and defendant has not challenged their admissibility on appeal.

In sum, the gang expert's testimony did not violate the Confrontation Clause.

3. *The Abstracts of Judgment Must Be Corrected*

Two abstracts of judgment were prepared in this case—one for the indeterminate part of the sentence ("indeterminate abstract"), and one for the determinate part of the sentence ("determinate abstract"). We find the indeterminate abstract is incomplete and the determinate abstract contains $920 in fines and assessments not imposed at sentencing.

Because defendant was convicted of four felonies, the court properly imposed four $40 court security fees (§ 1465.8), for a total of $160, and four $30 court facilities assessments (Gov. Code, § 70373), for a total of $120. The indeterminate abstract accurately reflects the court's orders. However, the determinate abstract adds an additional $40 court security fee (§ 1465.8) and $30 court facilities assessment (Gov. Code, § 70373). Because these fees should not have been imposed, we amend the determinate abstract to delete them.

The sentencing court must impose a restitution fine, "commensurate with the seriousness of the offense," of between $300 and $10,000 to be deposited in the State Restitution Fund. (§ 1202.4, subd. (b)(1).) The restitution fine is in addition to any victim restitution ordered under section 1202.4, subdivision (f). Here, the court properly imposed a $10,000 restitution fine. The indeterminate abstract accurately reflects the court's order. However, since the determinate abstract improperly adds an additional $280 restitution fine, we amend the determinate abstract to delete it.

In addition to the restitution fine required by section 1202.4, subdivision (b), the court must impose an additional restitution fine—a probation revocation restitution fine under section 1202.44 if probation is granted, and a parole revocation restitution fine under section 1202.45 if the sentence includes a period of parole. This fine, imposed in the same amount as that set by the court under section 1202.4, subdivision (b), is suspended pending the defendant's satisfactory completion of probation or parole.

(§ 1202.45, subd. (c); § 3060.1.) Here, probation was denied and defendant was sentenced to an indeterminate prison term with the possibility of parole. Therefore, the court properly imposed and stayed a parole revocation fine (§ 1202.45) equal to the $10,000 restitution fine (§ 1202.4, subd. (b)), and did not impose a probation revocation fine (§ 1202.44). The indeterminate abstract accurately reflects the court's order. But, the determinate abstract improperly adds an additional $280 parole revocation fine (§ 1202.45) and $280 probation revocation fine (§ 1202.44); Accordingly, we amend the determinate abstract to delete them.

The determinate abstract reflects a $10 state surcharge (§ 1465.7), which the court did not impose at sentencing. The court's sentence was proper because the state surcharge does not apply in this case. (§ 1465.7, subd. (a); § 1464, subd. (a)(3).) Because the surcharge is erroneous, we amend the determinate abstract to delete it.

Finally, the court must impose a $4 air ambulance fee on every Vehicle Code conviction. (Gov. Code, § 76000.10, subd. (c)(1).) Although the court properly imposed this fee at sentencing, the fee is not reflected in either abstract of judgment. We therefore amend the indeterminate abstract to add the air ambulance fee.

DISPOSITION

We affirm the judgment. We modify the abstract of judgment for the indeterminate sentence to add a $4 air ambulance fee (Gov. Code, § 76000.10, subd. (c)(1)). We modify the abstract of judgment for the determinate sentence to remove all fines and assessments reflected in section nine ("Financial Obligations"). We direct the court to amend the abstracts of judgment to reflect the modifications, and to forward copies of the amended abstracts of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

ALDRICH, Acting P. J.

JONES, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.